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**IN THE  
COURT OF APPEALS OF INDIANA**

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ROGER COX,)

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 65A01-0109-CR-354

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APPEAL FROM THE POSEY CIRCUIT COURT  
The Honorable James M. Redwine, Judge  
Cause No. 65C01-0009-DF-00073

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**June 4, 2002**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

Roger Cox was convicted by a jury of unlawful disposal of solid waste, a Class D felony. Cox now appeals his conviction. We reverse.<sup>1</sup>

### Issues<sup>2</sup>

Cox raises the following consolidated and restated issues for our review:

1. Whether the trial court properly admitted into evidence certain photographs; and
2. Whether there was sufficient evidence to support Cox's conviction for unlawful disposal of solid waste, a Class D felony.

### Facts and Procedural History

The facts reveal that Cox owns property located at 11820 Broadway Road, Evansville, Posey County, Indiana. Cox operates a salvage yard and recycling operation on the property known as "The Junkyard." The property is currently deeded to Junco, Inc. Cox does not now nor has he previously possessed an Indiana permit to maintain an open dump. In addition, Cox is currently not a registered salvage yard operator with the Indiana Bureau of Motor Vehicles.<sup>3</sup>

In 1988, the Indiana Department of Environmental Management ("IDEM") received complaints that the subject property was being operated as an open dump. IDEM conducted

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<sup>1</sup> We heard oral argument at Floyd Central High School on April 16, 2002, and we commend counsel for their capable advocacy and thank the high school and the Floyd County Bar Association for their warm hospitality.

<sup>2</sup> Cox also raises the issue that the trial court erred in denying his motion for judgment on the evidence pursuant to Indiana Trial Rule 50(A). Because we have determined that there was insufficient evidence to support Cox's conviction for unlawful disposal of solid waste, a Class D felony, we need not address this issue.

<sup>3</sup> This contention is somewhat disputed, but it appears that the IRS revoked his permit.

inspections of the property on May 20, July 8, and October 17, 1991, and February 7, 1994.

On August 14, 1995, an Agreed Order was entered between IDEM and Cox. The Agreed Order sets forth these findings:

4. The site was owned by Mr. Louise Park Ritz, deceased, until December 2, 1992, at which time Junco, Inc. became the owner of the Site. The Site is currently being bought on contract by Mr. Roger Cox.

\* \* \*

6. Based upon information gathered by the IDEM during the above noted inspections, [Cox and Junco, Inc.] have been found in violation of the Indiana Environmental Management Act, Ind. Code 13-7 and the Indiana Administrative Code, 329 IAC 2.

7. On the inspections noted above, [Cox and Junco, Inc.] were found in violation of 329 IAC 2-4-2 and -3, which prohibit respectively, any person from causing or allowing the storage, containment, processing, or disposal of solid waste in a manner which creates a threat to human health or the environment, and the open dumping and open dumps, as those terms are defined in Ind. Code 13-7-1-16. These violations are based on the fact that during those inspections IDEM observed that [Cox and Junco, Inc.] allowed an open dump to exist on the site.

8. On the inspections noted above, [Cox and Junco, Inc.] were found in violation of IC 13-7-4-1(3) and (4), which require respectively, that no person shall deposit any contaminants upon the land in such place and manner which creates, or which would create, a pollution hazard, or deposit or cause to allow the deposit of any contaminants or solid waste upon the land except through the use of sanitary landfills or another method acceptable to the solid waste management board, and that no person shall dump, cause or allow the open dumping of garbage or any other solid waste in violation of these rules adopted by the solid waste management board. These violations are based on the fact that during these inspections IDEM observed that [Cox and Junco, Inc.] allowed an open dump to exist at this Site.

Exhibit 1, P 5-6.

The trial court ordered the following in the Agreed Order:

1. [Cox and Junco, Inc.] shall maintain compliance with all applicable laws and rules, of any board created under Title 13 of the Indiana Code, from the date of issuance of this order by the Commissioner.

2. [Cox and Junco, Inc.] shall immediately cease and desist from the unpermitted receipt of solid wastes at the Site.
3. [Cox and Junco, Inc.] shall, within thirty (30) days of the effective date of this Order, remove all solid waste from the Site to an approved solid waste management facility, or [Cox and Junco, Inc.] may choose to bury only the roofing shingles currently on-site if the conditions in paragraph 4 of this Order are followed. If the burial option is chosen and the conditions in paragraph 4 are not complied with, then [Cox and Junco, Inc.] shall be found in violation of this Order and appropriate actions will be taken, including but not limited to [Cox and Junco, Inc.] having to immediately remove and dispose the buried roofing shingles to an approved solid waste management facility.
4. If [Cox and Junco, Inc.] choose to bury the roofing shingles currently on-site, they must follow the guidelines listed below and complete the burial of the shingles on-site within ninety (90) days of the effective date of this Order.
  - a. [Cox and Junco, Inc.] shall notify IDEM Solid Waste Compliance Section fifteen (15) days prior to the burial of the roofing shingles on-site.
  - b. [Cox and Junco, Inc.] shall remove all other material including but not limited to; solid waste, auto parts, barrels, scrap metal and other miscellaneous items from the areas of the roofing shingles prior to the burial of the roofing shingles. Solid Waste that is removed shall be taken to an approved solid waste management facility within thirty (30) days of the effective date of this Order. [Cox and Junco, Inc.] shall provide written documentation to the office of Solid and Hazardous Waste that the solid waste removed from the Site has been taken to a permitted solid waste disposal or processing facility within thirty (30) days after the disposal or processing is completed.
  - c. [Cox and Junco, Inc.] shall reroute any surface water drainage around the burial site to keep surface water from flowing through the burial site. This must be done prior to the burial of the roofing shingles.
  - d. The cover of the burial of the roofing shingles on-site shall include a minimum of six (6) inches of top soil and a minimum of a two (2) percent slope. The site shall be managed to promote soil stabilization within thirty (30) days after burial is completed.
  - e. [Cox and Junco, Inc.] shall record the burial of the roofing shingles on-site on the legal deed of the property at the Posey County Court House within twenty (20) days of the completion of the burial. A copy of the deed recording must be submitted to IDEM within thirty (30) days of the completion of the burial.
5. [Cox and Junco, Inc.] shall not operate a solid waste disposal facility unless it is permitted under 329 IAC 2 and IC 13-7.

6. If the removal option is chosen, [Cox and Junco, Inc.] shall provide written documentation to the Office of Solid and Hazardous Waste that the solid waste removed from the Site has been taken to a permitted solid waste disposal or processing facility within (30) days after the disposal or processing is completed.

\* \* \*

15. This Agreed Order shall remain in effect for a period of three (3) years after the effective date.

Exhibit 1, pg 6-7. Furthermore, pursuant to the terms of the Agreed Order, Cox was fined a civil penalty of \$4,375.00, payable to the Indiana Environmental Management Special Fund.

On July 24, 1996, IDEM filed with the trial court a verified complaint for civil enforcement. On April 16, 1997, the trial court entered summary judgment in favor of IDEM and ordered Cox to comply with the terms of the Agreed Order. In addition, the trial court ordered Cox to comply with the following within 10 days:

- 1) Move the mobile home located on the property so that the ground underneath the mobile home may be properly filled in.
- 2) Remove any solid waste (e.g. couch, mattresses, etc.) in and around the hole before filling in. Any solid waste removed shall be taken to an approved solid waste facility and proper documentation shall be forwarded to IDEM.
- 3) Grade the area with clay-type soil to prevent the ponding of surface water.

Appellant's Appendix at 21.

On August 8, 1997, Cox failed to appear on proceedings involving the summary judgment order and the trial court ordered Cox to pay the civil penalty in the amount of \$4,375.00 within seven days. On December 4, 1998, an inspector from IDEM was denied access to the subject property by Cox. However, the IDEM inspector from the roadway observed open dumping of solid waste on the property, such as furniture, paint cans and tires.

On March 1, 1999, IDEM obtained a search warrant in order to make an inspection of

the subject property. Subsequently, the inspector observed illegal dumping of solid waste on Cox's property. In addition, the inspector observed that the mobile home that the trial ordered to be moved on April 16, 1997, remained in the same location.

On March 27, 2000, IDEM obtained another search warrant in order to make an inspection of the property. During this inspection, IDEM inspectors took soil samples from the area of the property where underground storage tanks had been placed. The tanks, which were located above-ground, appeared to have been previously used and were leaking an unknown substance. In addition, IDEM inspectors observed that numerous tires and construction demolition debris had been dumped on the property. Furthermore, IDEM inspectors observed that an area on the property where shingles had previously been dumped remained uncovered and there was no sign that a clay-based soil had been used to cover any of the earlier disputed area of dumping.

On October 4, 2000, the State filed a three count information against Cox charging him with unlawful deposit of contaminant or solid waste, a Class D felony,<sup>4</sup> unlawful disposal of solid waste, a Class D felony,<sup>5</sup> and unlawful operation of a pollution contributing facility, a Class D felony.<sup>6</sup> Regarding count two, the information provides in pertinent part that:

. . . on or about the 27<sup>th</sup> day of March 2000, Roger Cox did knowingly or intentionally dump or cause or allow the open dumping of garbage or any other

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<sup>4</sup> Ind. Code § 13-30-2-1(4).

<sup>5</sup> Ind. Code § 13-30-2-1(5).

<sup>6</sup> Ind. Code § 13-30-2-1(7).

solid waste on the property located at 11820 Broadway, a/k/a The Junkyard, in violation of the rules adopted by the solid waste management board, to wit: allowing shingles, tires and construction demolition to be openly dumped upon the property, contrary to the form of the statutes made and provided by I.C. 13-30-2-1(5) and I.C. 13-30-6-1 and against the peace and dignity of the State of Indiana.

Appellant's Appendix at 24.

The State later dismissed count one of the information that charged Cox with unlawful deposit of a contaminant or solid waste, a Class D felony. The jury later found Cox guilty of only unlawful disposal of a solid waste, a Class D felony. On August 29, 2001, the trial court sentenced Cox to one and one-half years at the Indiana Department of Correction, all suspended, imposed a fine of \$1.00, and ordered Cox to pay court costs in the amount of \$125.00 and an initial probation user fee of \$100.00. This appeal ensued. Additional facts will be provided when necessary.

### Discussion and Decision

#### I. Admission of Evidence

Cox first contends that the trial court erred in admitting several photographs into evidence. We disagree.

##### A. Standard of Review

We review the trial court's admission of photographic evidence for an abuse of discretion. Byers v. State, 709 N.E.2d 1024, 1028 (Ind. 1999). Relevant evidence, including photographs, may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice. Evid. R. 403; Byers, 709 N.E.2d at 1028. Moreover, a claim of error in the admission or exclusion of evidence will not prevail on appeal "unless a

substantial right of the party is affected." Evid. R. 103(a).

### B. Photographs

Several months prior to trial, Cox served a subpoena duces tecum on the State's witnesses requesting that they produce "all information, records, summaries, documents and the like regarding Roger Cox and/or the property located at 11820 Broadway, Evansville." Appellant's Appendix at 29-32. On the morning of trial, the State received seventeen photographs of Cox's property from IDEM. The pictures were taken by inspectors of IDEM on March 27, 2000, and depict the condition of Cox's property on the date of the inspection.

After receiving the photographs, the State submitted them to Cox. He had not previously been afforded the opportunity to view the photographs. Consequently, Cox objected to the admission of the photographs into evidence on the basis that it would harm the preparation of his case. The trial court overruled Cox's objection. However, the trial court gave Cox almost two hours to review the photographs and question the IDEM employees who took the photographs. See R. 10-11. These photographs were later admitted at trial during the State's case-in-chief without objection from Cox.

According to Cox, he is entitled to a new trial because the State's discovery violation substantially affected his rights. The purpose of pretrial discovery is to promote justice and to prevent surprise by allowing the defense adequate time to prepare its case. Murphy v. State, 499 N.E.2d 1077, 1082 (Ind. 1986). The Indiana Supreme Court has long recognized the proper roles of trial and appellate courts in the resolution of discovery disputes:

A trial judge has the responsibility to direct the trial in a manner that facilitates the ascertainment of truth, ensures fairness, and obtains economy of time and



effort commensurate with the rights of society and the criminal defendant. Where there has been a failure to comply with discovery procedures, the trial judge is usually in the best position to determine the dictates of fundamental fairness and whether any resulting harm can be eliminated or satisfactorily alleviated. Where remedial measures are warranted, a continuance is usually the proper remedy, but exclusion of evidence may be appropriate where the discovery non-compliance has been flagrant and deliberate, or so misleading or in such bad faith as to impair the right of fair trial. The trial court must be given wide discretionary latitude in discovery matters since it has the duty to promote the discovery of truth and to guide and control the proceedings, and will be granted deference in assessing what constitutes substantial compliance with discovery orders. Absent clear error and resulting prejudice, the trial court's determinations as to violations and sanctions should not be overturned.

Cliver v. State, 666 N.E.2d 59, 64 (Ind. 1996) (quoting Vanway v. State, 541 N.E.2d 523, 526-27 (Ind. 1989) (citations omitted)). Failure to alternatively request a continuance upon moving to exclude evidence, where a continuance may be an appropriate remedy, constitutes a waiver of any alleged error pertaining to noncompliance with the court's discovery order. Martin v. State, 535 N.E.2d 493, 497 (Ind. 1989). Exclusion of the evidence is an extreme remedy and is to be used only if the State's actions were deliberate and the conduct prevented a fair trial. Berry v. State, 715 N.E.2d 864, 866 (Ind. 1998). Here, Cox failed to seek a continuance from the trial court for additional time to review the photographs and prepare his defense. Thus, we must find that Cox waived this issue for our review.

In addition, Cox has also waived this issue for our review by failing to lodge a timely objection to the admission of the photographs at trial on the basis that the discovery violation denied him adequate time to prepare his defense. Where there is no timely objection at trial, an issue is procedurally defaulted and is therefore normally unavailable on appeal. Townsend v. State, 632 N.E.2d 727, 730-31 (Ind. 1994). However, a reviewing court may

bypass an error that a party procedurally defaults when the error is plain or fundamental. Id. The record reveals that Cox lodged an objection to the court when the State tendered the photographs to him after opening statements. During its case-in-chief, the State introduced the photographs into evidence. Cox did not object at that time to the admission of photographs numbered 4-7, 10-13, 15-19, and 21-25. R. 56, 75-77, 79, 81, 86-93. With regard to the other photographs, Cox objected to photographs 8 and 9 on *relevancy* grounds. R. 60. Cox also made a timely objection to photographs numbered 14 and 20, but provided no basis for his objection. R. 86, 20. In addition, Cox objected to photograph number 26 for the reason that the *prejudicial value outweighed the probative value*. R. 94. Cox never objected to the trial court's admission of the photographs on the basis that the late production of this evidence by the State denied him an adequate time to prepare for his defense.

Accordingly, we hold that Cox waived this issue for our review by failing to seek a continuance and by failing to lodge a timely objection to the admission of the photographs on the basis that the discovery violation by the State denied him an adequate time to prepare his defense.<sup>7</sup>

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<sup>7</sup> We note that this court is extremely troubled by the State's late production of the photographs. Although it appears that the State's discovery violation was neither deliberate nor flagrant, we strongly encourage the State to communicate with its witnesses and gather all of its evidence in a timely fashion in order to prevent such a mishap in the future. The State has the ultimate responsibility for gathering evidence from its witnesses. Furthermore, we strongly discourage "ambush litigation" and will scrutinize any action that gives evidence of such tactics by counsel. Presenting requested discovery materials the day of trial is quite simply unacceptable.

Moreover, we view the placement of the burden on the opponent of evidence, introduced by a discovery violator, to show flagrant and deliberate abuse of discovery as inequitable and unduly harsh. When faced with a discovery violation, an opponent of evidence either has the option of objecting and requesting a continuance, which necessarily involves more time and expense, or assenting to the admission of the evidence that waives the issue for later appellate review. The opponent is stuck between the quintessential "rock and a

## II. Sufficiency of the Evidence

Cox also contends that there was insufficient evidence to support his conviction for unlawful disposal of solid waste, a Class D felony. We agree.

### A. Standard of Review

Our standard of review when considering the sufficiency of evidence is well settled. We will not reweigh the evidence or consider the credibility of witnesses. Weaver v. State, 702 N.E.2d 750, 752-53 (Ind. Ct. App. 1998). Only the evidence most favorable to the verdict, together with all reasonable inferences that can be drawn therefrom will be considered. Id. If a reasonable trier of fact could have found the defendant guilty based on the probative evidence and reasonable inferences drawn therefrom, then a conviction will be affirmed. Id.

### B. Unlawful Disposal of Solid Waste

Cox argues that there is insufficient evidence to support his conviction of unlawful disposal of solid waste, a Class D felony, because the State failed to present evidence of the rules adopted by the solid waste management board. In addition, Cox argues that there is insufficient evidence to support his conviction because there is no substantive evidence to support the findings by the jury that the items on his property constituted solid waste. Essentially, Cox has brought a two-pronged attack to his conviction arguing that the State failed to prove the content of the solid waste management board rules he allegedly violated

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hard place." A more equitable view would entail placing the burden on the discovery violator, the proponent of the evidence, to show why his or her noncompliance with discovery should not be deemed flagrant or deliberate by the trial court warranting remedial action.

and failed to present sufficient evidence of conduct that violated these rules.

In the present case, Cox was found guilty by a jury of violating Indiana Code sections 13-30-2-1(5) and 13-30-6-1. The first statutory provision provides in pertinent part that:

A person may not do any of the following:

\* \* \*

(5) Dump or cause or allow the open dumping of garbage or of any solid waste<sup>8</sup> in violation of rules adopted by the solid waste management board.

Ind. Code § 13-30-2-1(5) (footnote added). The second statutory provision Cox was found guilty for of provision provides in pertinent part that:

(a) A person who intentionally, knowingly, or recklessly violates:

- (1) environmental management laws;
- (2) air pollution control laws;
- (3) water pollution control laws;
- (4) a rule or standard adopted by one (1) of the boards; or
- (5) a determination , a permit, or an order made or issued by the commissioner under environmental management laws or IC 13-7 (before its repeal);

commits a Class D felony . . . .

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<sup>8</sup> Our legislature has defined the term "solid waste" as follows:

(a) "Solid waste", for purposes of IC 13-19, IC 13-21, IC 13-20-22, and environmental management laws, except as provided in subsection (b), means any garbage, refuse, sludge from a waste treatment plant, sludge from a water supply treatment plant, sludge from an air pollution control facility, or other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, or agricultural operations or from community activities. The term does not include:

(1) solid or dissolved material in:

(A) domestic sewage; or

(B) irrigation return flows or industrial discharges;

that are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act Amendments (33 U.S.C. 1342);

(2) source, special nuclear, or byproduct material (as defined by the Atomic Energy Act of 1954 (42 U.S.C. 2011 et. seq.));

(3) manures or crop residues returned to the soil at the point of generation as fertilizers or soil conditioners as part of a total farm operation; or

(4) vegetative matter at composting facilities registered under IC 13-20-10 . . . .

Ind. Code § 13-11-2-205.

Ind. Code § 13-30-6-1.<sup>9</sup>

Indiana Code section 13-11-2-147 provides that "'[o]pen dumping', for purposes of environmental management laws, means the act of disposing of solid waste at an open dump." Our legislature has defined the term "open dump" as follows:

"Open dump", for purposes of environmental management laws, means the consolidation of solid waste from one (1) or more sources or the disposal of solid waste at a single disposal site that:

- (1) does not fulfill the requirements of a sanitary landfill or other land disposal method as prescribed by law or regulations; and
- (2) is established and maintained:
  - (A) without cover; and
  - (b) without regard to the possibilities of contamination of surface or subsurface water resources.

Indiana Code § 13-11-2-146.

## 1. Content

We will first address Cox's argument that the State failed to present evidence of the solid waste management board rules that he allegedly violated. Cox is not disputing the existence of rules promulgated by the solid waste management board that make it a crime to dump or allow the open dumping of garbage or solid waste. Cox concedes the validity and

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<sup>9</sup> We note that in certain circumstances, an individual charged with unlawful disposal of solid waste, a Class D felony, may avail themselves of a statutory defense. Indiana Code section 13-30-3-13(a) provides that:

Except as provided in subsection (c), an enforcement action may not be taken under this chapter for a violation of IC 13-30-2-1(5) against a landowner on whose land garbage or other solid waste, except hazardous waste, has been illegally dumped without the landowner's consent unless the commissioner has made a diligent and good faith effort to identify, locate, and take enforcement action against a person who appears likely to have committed or caused the illegal dumping.

existence of such rules. Rather, Cox argues that one element of the crime of unlawful dumping of solid waste, a Class D felony, is that the State must present evidence of the rules adopted by the solid waste management board. Essentially, Cox argues that the State had the burden of proof at trial to cite the specific rules contained in the Indiana Administrative Code that he allegedly violated. Because Cox did not contest the existence or validity of the solid waste management board rules making it a crime to dump or allow the open dumping of garbage or solid waste, we do not believe that the State was required to cite at trial the specific rules Cox allegedly violated or to prove promulgation of such a rule.

In the present case, it is important to recognize that Indiana Code sections 13-30-2-1(5) and 13-30-6-1, which prohibit the unlawful disposal of solid waste, explicitly reference the rules of the solid waste management board. Conversely, a rule of the solid waste management board found at 329 Indiana Administrative Code section 10-4-1, explicitly references Indiana Code section 13-30-2-1(5).<sup>10</sup> Moreover, 329 Indiana Administrative Code

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<sup>10</sup> The rules of the solid waste management board also refer to Indiana Code section 36-9-30-35 which provides in pertinent part that:

(a) Solid waste may be disposed of on land only through use of sanitary landfills, incineration, composting, garbage grinding, or other acceptable methods approved by the department of environmental management in accordance with the rules adopted by the solid waste management board. A person may not operate or maintain an open dump.

(b) A person may not operate or maintain facilities for the collection and disposal of solid waste, except as set out in section 4 of this chapter or under rules adopted by the solid waste management board.

(c) Failure to comply with this section constitutes the operation of a nuisance inimical to human health. A prosecuting attorney who receives a report of such a failure from the department of environmental management district, or a local health officer shall cause appropriate court proceedings to be instituted.

(d) A person who fails to comply with this section commits a Class C infraction. If the violation is a continuing nature, each day of failure to comply constitutes a separate infraction.

section 10-4-3 provides that the statutory definition of "open dumping" and "open dumps" contained in Indiana Code sections 13-11-2-147 and 13-11-2-146 respectively, are to be the definitions applicable to the rules. Thus, it is clear the environmental laws promulgated by our legislature and the rules of the solid waste management board, pertaining to the unlawful disposal of solid waste, are to be read and interpreted in conjunction with one another. Therefore, the State in the present case had the burden at trial to present evidence of the content of the environmental laws promulgated by our legislature and rules of the solid waste management board that prohibit the unlawful disposal of solid waste.<sup>11</sup>

The record reveals that the IDEM inspectors during their testimony either cited to the repealed section of the Indiana Administrative Code or lacked knowledge during their testimony of the correct provision. However, the jury instructions adequately informed the jury of the content of the environmental laws and solid waste management board rules Cox allegedly violated. See R. 75-90. Moreover, the jury instructions provided definitions of

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<sup>11</sup> The Indiana Administrative Code provides in pertinent part:

The purpose of this rule is to implement provisions of the following:

- (1) IC 13-30-2-1(3) and IC 13-30-2-1(4) relating to the deposit of contaminants or solid waste upon the land except as permitted in this article
- (2) IC 13-30-2-1(5) and IC 36-9-30-35 prohibiting dumping, causing, or allowing the open dumping of garbage or of other solid waste in violation of this article.

329 IAC 10-4-1.

No person shall cause or allow the storage, containment, processing, or disposal of solid waste in a manner which creates a threat to human health or the environment, including the creating of a fire hazard, vector attraction, air or water pollution, or other contamination.

329 IAC 10-4-2.

Open dumping and open dumps, as those terms defined in IC 13-11-2-146 and IC 13-11-2-147, are prohibited.

329 IAC 10-4-3.

essential terms contained in the environmental laws enacted by our legislature and rules of the solid waste management board. Therefore, we find that the State provided sufficient evidence of the content of the Indiana environmental laws and rules of the solid waste management board that Cox allegedly violated.

## 2. Conduct

The question remains whether the State provided sufficient evidence of conduct by Cox that violated the environmental laws enacted by our legislature and the rules of the solid waste management board making it a crime to dump or allow the open dumping of garbage or solid waste. Clearly, the State could not merely stand by the allegation that Cox had committed the crime of unlawful disposal of a solid waste; the State was required to present evidence supporting its contention that Cox had committed the violations. An analogous situation exists where an individual has been ticketed for committing the moving violation of speeding. The State's mere allegation that an individual was speeding would constitute insufficient evidence. The State is required to present evidence of how fast an individual was traveling and the posted speed limit in the applicable area in order to convict an individual of the traffic violation. However, the State would not necessarily have to cite to the particular law that makes it a crime to travel faster than the posted speed limit unless an individual was challenging the existence or validity of such a traffic law.

Here, Marilyn Kay Driskill, an inspector with IDEM, testified at trial that on March 27, 2000, she observed used tires, construction debris, and miscellaneous solid waste on Cox's property. Regarding the construction debris, Driskill testified that she observed roof



shingles, metal, wood, plumbing, fiberboard, and electrical fixtures. With regard to the solid waste, Driskill testified that she observed bags of household trash, used household appliances, five-gallon containers, and broken furniture.

George DeLancey, also an inspector with IDEM, testified at trial that "[w]hen I entered onto [Cox's property], basically I saw what I believed several violations of the solid waste management board rules and environmental laws." R. 71. Moreover, DeLancey testified that on March 27, 2000, he observed on Cox's property numerous vehicles that were not in a condition for salvage. In addition, DeLancey testified that he observed construction debris, large underground tanks placed above-ground, scrap metal, and several thousand waste tires. DeLancey testified that these items were strewn about the property and not placed in a manner conducive to salvaging or recycling. Furthermore, DeLancey testified at trial that he saw roof shingles and construction debris that appeared to have been openly dumped on Cox's property, and that this dumping did not appear to be roadside dumping. DeLancey classified the shingles and construction debris as solid waste.

Tony Thompson testified that in the past two to three years, he had dumped ten to twelve loads of construction debris on Cox's property. Thompson stated he transported the debris to Cox's property via a truck pulling a sixteen-foot trailer. In addition, Thompson testified at trial that he dumped several loads of construction debris on the subject property several days prior IDEM's inspection on March 27, 2000. Thompson stated that Cox was not on the subject property when he dumped the debris, and that "[i]f he was there, he wouldn't have let me dump it." R. 145. According to Thompson, shortly after dumping the most

recent load of construction debris, Cox telephoned him and stated "Get out here and get this up. This can't be dumped here." Id. Thompson testified that he had Cox's permission to dump "solid fill," and that he misinterpreted what actually constituted "solid fill." Moreover, Thompson testified that on or about March 27, 2000, he arrived at Cox's property with a crew to remove the debris but was prohibited because IDEM was conducting an inspection. Thompson stated that he later went to the property to clean up the construction debris.

Cox testified at trial that he operates a salvage and recycling yard. Cox admitted that there were tires on his property on March 27, 2000, but denied the State's characterization that they were "waste tires." Cox testified that the majority of the tires located on his property had rims or were pierced prohibiting them from holding water and attracting mosquitoes. According to Cox, the tires located on his property were being held for: (1) resale; (2) towing vehicles without tires; (3) props for vehicles without tires; or (4) conversion to children's swings. In addition, Cox testified that he only allowed "solid fill" to be dumped on his property and that Thompson dumped the construction debris on the subject property without his knowledge or consent. Cox characterized "solid fill" as dirt, sand, martyr, bricks, and concrete pieces. Furthermore, Cox denied that there were used shingles on his property besides those permitted to be buried pursuant to the Agreed Order.

After reviewing the record, we believe that the evidence is insufficient to support Cox's conviction for unlawful disposal of solid waste, a Class D felony. First, the State failed to show how Cox's property did not fulfill the requirements of a sanitary landfill and was an "open dump" as defined in Indiana Code section 13-11-1-246. Moreover, we do not believe

that the State's evidence sufficiently established that items on Cox's property constituted "solid waste" as defined in Indiana Code section 13-11-2-205. Furthermore, we find that the State failed to prove that Cox's conduct violated the Indiana environmental laws and the rules of the solid waste management board. The IDEM inspectors' testimony, while extensive, failed to tie the condition of the property to the alleged violations. Their testimony failed to bridge the gap between the facts and circumstances surrounding Cox's charge of unlawful disposal of solid waste, a Class D felony, and the current status of the law and rules of the solid waste management board. Simply, the IDEM inspectors' testimony failed to guide the jury through the myriad environmental laws and rules of Indiana.

Accordingly, we find that there was insufficient evidence to support Cox's conviction for unlawful disposal of a solid waste, a Class D felony.

#### Conclusion

Based on the forgoing, we hold that Cox waived the issue of the trial court's admission of the photographs into evidence. However, we hold that there was insufficient evidence to support Cox's conviction for unlawful disposal of solid waste, a Class D felony. Accordingly, we reverse Cox's conviction.

Reversed.

BAKER, J., and KIRSCH, J., concur.

